IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of HUBBA DWAYNE TEAL, Petitioner.	)	No. 60720-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 1, 2010

Grosse, J. — A personal restraint petition establishing that a judgment and sentence incorrectly states the standard range is not time-barred under RCW 10.73.090 because it demonstrates a facially invalidity in the judgment and sentence. Here, the record shows that Hubba Teal's standard range was miscalculated in the judgment and sentence. Thus, his petition is not time-barred and he may also challenge the underlying plea based on this facial defect. Because it demonstrates that he was misinformed of the standard range, a direct consequence of his plea, he has established that his plea was involuntary. Accordingly, we grant the petition.

FACTS

In March 1996, Teal pleaded guilty to one count of attempted second degree robbery. The Statement of Defendant on Plea of Guilty (Plea Statement) advised Teal that his standard range was 10 to15 months, "based on the prosecuting attorney's understanding of [his] criminal history." The Plea Statement further advised that he would be sentenced to at least one year of community placement.

Before sentencing, there was some dispute about the standard range as follows:

> [DEFENSE COUNSEL]: The question, I guess, that we have here is the sentencing range. My understanding of the seriousness score

> for attempted second degree robbery is a four. With Mr. Teal's criminal history, I believe we have three-and-a-half points, that would be 15 months, 75 percent of that by my calculations is eleven and a quarter months.
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> [PROSECUTOR]: Actually I figured out the 75 percent and calculating the range, the actual range by figuring a seriousness of four and then taking three-quarters of that, I have done that in figuring the 11 to 15 range and I recommend the top of that.
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> [DEFENSE COUNSEL]: I guess, Your Honor, in responding to that, when [the prosecutor] and I discussed this plea negotiation we talked about the criminal history as known at the time and Mr. Teal did come forward and say I have a different name, there's a history actually disclosed, a criminal history, and that was calculated in that and I think [the prosecutor] and I at that time discussed 14 months.
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> THE COURT: Well, I'm looking at the plea agreement that said he understands the range to be 10 to 15 months. Is this incorrect?
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> [DEFENSE COUNSEL]: The range is basically correct. I calculated it a little differently but it is certainly within the framework. And what we would ask, based upon Mr. Teal's statement, his acknowledgment, his disclosing to the court his criminal history, that he be allowed to serve the low end of the range.

The court then imposed 15 months' confinement based on a standard range of 10 to 15 months, but did not impose community placement.

After a notification by the Department of Corrections (DOC) that the correct standard range was 12 to 14 months, the court held a hearing to resentence Teal within the correct standard range. The court then modified the sentence to 14 months. The court stated that the prosecutor would draft an amended judgment and sentence to reflect the correct standard range and modified sentence. The court entered an Agreed Order Amending the Judgment and Sentence that stated:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Judgment and Sentence herein shall be and hereby is amended as follows:
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> 1. To reflect that Defendant shall serve 14 months' confinement with the Department of Corrections rather then [sic] the 15 months ordered in

the original Judgement [sic] and Sentence.

Teal did not object to or appeal the modified sentence.

In 1999, Teal was convicted of first degree robbery and sentenced to life in prison without parole as a persistent offender. The 1996 attempted robbery conviction counted as a "most serious offense" in support of the persistent offender sentence. Teal now challenges his 1996 conviction in a personal restraint petition, asserting that his guilty plea was involuntary because he was misinformed of the consequences of his plea.

ANALYSIS

The State first contends that Teal's personal restraint petition should be dismissed because it improperly relitigates issues already decided on direct appeal and is an improper successive petition. But as Teal points out, the State does not claim that the issues raised in the current petition relitigate claims raised on direct appeal or collateral attack of the judgment and sentence on the 1996 conviction. Rather, the State contends that the issues were already raised on direct appeal and in a personal restraint petition attacking the Persistent Offender Accountability Act (POAA) sentence for the later 1999 conviction. In any event, the record indicates that he did not attack the calculation of his offender score in either direct appeal or collateral attack of the 1999 conviction. Additionally, our state Supreme Court has already determined that this is not an improper successive petition.[1]

[1] This court attempted to transfer this petition to the state Supreme Court as a successive petition, but the court sent it back, concluding that it was not a successive petition because the previous petition did not attack the judgment for the 1996 conviction but simply the use of that conviction in support of the sentence for the 1999

The State next contends the personal restraint petition is barred as untimely under RCW 10.73.090. That statute sets forth the time limitations for a collateral attack on a judgment and sentence and provides:

> No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.[2]

Teal argues that the judgment and sentence is facially invalid because it incorrectly imposed community placement when it was not statutorily authorized and incorrectly stated his standard range. Thus, he contends that his petition is not time-barred.[3]

The record does not support Teal's assertion that community placement was imposed. In fact, the option for community placement was left unchecked on the judgment and sentence. Thus, this claim of facial invalidity is without merit.

But there is merit to Teal's additional claim of facial invalidity. He asserts that the judgment and sentence incorrectly states the standard range and imposes a sentence that exceeds the correct range. Teal asserts that in fact his standard range for attempted second degree robbery was 9.75 to 12.75 months, not 10 to 15 months or even 12 to 14 months. He applies the standard range calculation for anticipatory

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judgment.

[2] RCW 10.73.090.

[3] He also asserts for the first time in his reply brief an additional basis for overcoming the time-bar, i.e., that he was not given notice of the time limit for collateral attacks, as required by RCW 10.73.110. But because arguments raised for the first time in reply are too late to warrant consideration, we decline to consider this argument. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, as discussed below, he has demonstrated facial invalidity and may overcome the time-bar on that basis.

offenses, taking 75 percent of the standard range for the 3.5 offender score (13 to 17 months), which is 9.75 to 12.75 months.[4]

The State takes conflicting positions on whether the standard range is erroneous. In its initial briefing, the State concedes that the standard range was miscalculated for an offender score of 3.5 and renders his sentence invalid on its face. But in a supplemental brief, the State withdraws that concession and asserts that the standard range was in fact correct but the offender score was wrong. The State contends that the correct offender score is 4, which corresponds to a standard range of 10 to 15 months as stated in the judgment and sentence. The State asserts that the offender score is 4 because Teal was on community placement at the time he pleaded guilty and that this was explained by the prosecutor at the sentencing hearing. Thus, the State contends that only the offender score was erroneously stated on the judgment and sentence and asserts that this is a technical defect that does not render the judgment and sentence invalid.

While Teal's attorney agreed at the sentencing hearing that the range stated in the plea statement—10 to 15 months—was "basically correct" and "certainly within the framework," he did not agree that the offender score was 4 and in fact earlier stated his belief that it was 3.5. Nor did the prosecutor explain at all the basis for the State's belief that the offender score was 4, much less state that it was because Teal was on community placement at the time, as the State asserts. In fact, as Teal contends, contrary to the State's assertion, he was not on community placement at the time he

[4] See former RCW 9.94A.410 (1996) (in effect at the time of sentencing) (recodified as RCW 9.94A.595 by Laws of 2001, ch. 10, § 6).

pleaded guilty. For support, he submits the judgment and sentence for the prior conviction, which does not indicate that community placement was imposed. And as he correctly points out, community placement was not statutorily mandated for that offense as the State claims, because he was not serving a DOC prison sentence for that conviction; he was sentenced only to a six-month jail term in the Snohomish County Jail.[5]

Additionally, as Teal points out, while the plea statement states the standard range as 10 to 15 months, it also states that this standard range is based on the criminal history as understood by the prosecutor. That history includes only three prior convictions and does not mention that he was on community placement at the time. The State's contention that the offender score was 4 is without basis.

Thus, because the standard range stated in the judgment and sentence corresponds to an offender score of 4, rather the correct offender score, it was incorrect. Consequently, Teal has demonstrated a facial invalidity to overcome the time bar.[6] Teal then argues that because he has demonstrated facial invalidity, he may challenge the conviction itself, including the voluntariness of the plea. The State contends that because the error is in the sentence only, the remedy is to remand to correct the sentence, citing In re Personal Restraint of Goodwin.[7]

In Goodwin, a judgment and sentence was invalid on its face because it

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[5] See former RCW 9.94A.700 (1995) (in effect at the time of sentencing) (community placement mandatory only for those sentenced to "a term of total confinement in the custody of the department" for specified offenses) (recodified as RCW 9.94B.050 by Law of 2008, ch. 231, § 56).
[6] In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).
[7] 146 Wn.2d 861, 50 P.3d 618 (2002).

miscalculated the standard range even though the defendant agreed to the erroneous standard range. The court held that the sentence was fundamentally defective because it was based upon an incorrect offender score and remanded for resentencing using the correct offender score.[8] In doing so, the court reiterated that "[c]orrecting an erroneous sentence in excess of statutory authority does not affect the finality of that portion of the judgment and sentence that was correct and valid when imposed."[9]

But we are constrained by the recent opinion in In re Personal Restraint of Bradley, where the court granted the personal restraint petition and permitted withdrawal of the plea when, as here, the defendant attacked both his sentence and plea based on an erroneous offender score.[10] There, the State conceded that the miscalculated offender score rendered the judgment and sentence facially invalid and the court held this defect also rendered the plea involuntary because the defendant was misinformed about the length of his sentence, a direct consequence of the plea.[11] The court then stated that the remedy for an involuntary plea was for the defendant to choose either to specifically enforce the plea agreement or withdraw the plea and held that he was entitled to withdraw his plea.[12] Accordingly, we are required to apply the same remedy here.[13]

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[8] Goodwin, 146 Wn.2d at 876.
[9] Goodwin, 146 Wn.2d at 877 (citing In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980)). In Carle, the court remanded for correction of an erroneous sentence, but cautioned, "Our holding does not affect the finality of that portion of the judgment and sentence that was correct and valid at the time it was pronounced." 93 Wn.2d at 34.
[10] 165 Wn.2d 934, 205 P.3d 123 (2009).
[11] 165 Wn.2d at 941.
[12] 165 Wn.2d at 941.
[13] The State fails to establish that Teal waived a challenge to the voluntariness of his plea by failing to object at sentencing as in State v. Mendoza, 157 Wn.2d 582, 141

The personal restraint petition is granted.[14]

Grosse, J.

WE CONCUR:

Leach, J.

Dwyer, J.

P.3d 49 (2006). Unlike in Mendoza, Teal was never informed of the correct offender score or standard range before sentencing. See 157 Wn.2d at 592.

[14] Teal also claims that he should be permitted to withdraw his plea based on misinformation of other direct consequences of his plea. Specifically, he asserts that he was misinformed that community placement was mandatory, that his driver's license would not be revoked, and that this offense was not a "most serious offense." But because he already demonstrated a basis for withdrawing his plea, we need not reach this additional claim. In any event, it is time-barred; misinformation about the consequences of the plea is not in itself a facial defect. In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 533, 55 P.3d 615 (2002).